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Harry L. Manion

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COMMENT

CREDITOR DEFENSES UNDER THE TRUTH IN LENDING ACT: THE DIMINISHING RADIUS OF 15 U.S.C. 1640(c).

Passage of the Truth in Lending Act (Act) in 1968¹ culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market.² In order to effectuate the Act's broad disclosure policy, Congress provided that any credit consumer could maintain a civil action against a creditor who violated the Act.³ Although such provision encouraged civil enforcement of the Act, the Act also provided creditors with two defenses to civil actions.⁴ While both defenses will be discussed, this comment will primarily focus on 15 U.S.C. § 1640(c) (hereinafter 1640(c)),⁵ because creditors have most heavily invoked this provision to defend a broad spectrum of disclosure violations.⁶ However, since its passage, courts consistently have construed section 1640(c) narrowly by ruling that the section only excuses violations caused by errors of a clerical nature.⁷ Moreover, two recent circuit court decisions have further diminished 1640(c)'s scope by ruling that the section's maintenance provision requires creditors to institute rechecking systems which are reasonably adapted to detect disclosure violations.⁸

This comment will consider the propriety of these narrow restrictions of 1640(c) in light of the Act's overall scheme and pervasive philosophy. To this end, the conditions which spawned the passage of the Act will be discussed and 1640(c) will be placed in the context of

¹ 15 U.S.C. §§ 1601-13, 1631-41, 1661-65 (Supp. IV 1969).

² *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 363 (1973).

³ 15 U.S.C. § 1640(a) (1970) provides: Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

⁴ *Id.* at 1640(b) & (c).

⁵ 15 U.S.C. § 1640(c) (Supp. V 1975) provides:

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

⁶ *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1162 (7th Cir. 1974) (disclosure omissions in retail installment sales contract); *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971) (creditor failed to include notary fee in computation of finance charge); *Ratner v. Chemical Bank Trust Co.*, 329 F. Supp. 270, 281-82 (S.D.N.Y. 1971) (creditor failed to disclose nominal annual percentage rate).

⁷ See, e.g., *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-67 (7th Cir. 1974); *Ratner v. Chemical Bank Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971); *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971).

⁸ *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1297 (5th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878-79 (7th Cir. 1976).

the Act's evolution. The comment will then examine the requirements of section 1640(c), paying particular attention to that section's intent element and maintenance proviso. After analyzing several cases raising the section 1640(c) defense, this comment will suggest that 1640(c) excuses only errors made in disclosing the annual percentage rate and that 1640(c)'s maintenance provision requires creditors to institute and adhere to rechecking systems which are reasonably adapted to detect annual percentage rate errors. It will be concluded that this narrow and specific judicial construction of the section 1640(c) defense is warranted, because such construction comports with the broadly remedial and pro-consumer orientation of the Truth in Lending Act.

1. THE BIRTH OF THE TRUTH IN LENDING ACT

In the period following World War II and ending with the 1968 passage of the Truth in Lending Act, the amount of consumer credit in this country increased in astronomical proportions.⁹ Against this soaring demand for credit weighed the charge that in many instances consumers did not know the actual price they paid for the credit they used.¹⁰ Because of the divergent, and at times fraudulent, practices by which consumers were informed of the cost of the credit extended to them, many consumers were prevented from shopping for the best credit terms available.¹¹ Indeed, consumers were usually faced with a plethora of bewildering rates, charges, and terms when seeking to borrow money or to buy consumer goods on an installment basis.¹²

Consumer confusion existed despite three different types of state credit legislation enacted at various intervals during the twentieth century.¹³ By the end of the first decade of this century most states had enacted usury laws, which set limits on the amount of interest charged for the use of money.¹⁴ However, unlike the Truth in Lending Act, usury laws do not require creditors to disclose the applicable rate of interest in a uniform manner nor do they apply to

⁹ *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 363 (1973). In this period outstanding consumer credit had increased from 5.6 billion to 95.9 billion, a rate of growth four and one-half times as great as that of the economy. *Id.*

¹⁰ H.R. REP. NO. 1040, 90th Cong., 2d Sess. 12, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1965.

¹¹ *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 363 (1973).

¹² H.R. REP. NO. 1040, 90th Cong., 2d Sess. 13, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1970. The report contains several examples of the diverse language which the credit industry employed to describe the cost of credit prior to the Act. It was found that creditors used "add on" rates to disclose the finance charge as a percentage, imposed supplementary charges such as credit investigation fees and "service charges," and often made no disclosure of a percentage rate at all. *Id.* In addition, a survey published in 1964 asked 800 families to estimate the rate of the finance charge they were paying on their consumer debts. The average estimate was approximately 8 percent, although the actual average rate paid was almost 24 percent. *Id.*

¹³ See Note, 22 CASE W. L. REV. 89, 94-97 (1970).

¹⁴ *Id.* at 94.

credit sales of goods because of the time-price doctrine.¹⁵ In addition to usury laws, many states began in the 1920's to initiate small loan legislation which set an interest ceiling of three and one half percent per month on the unpaid balance, approximately 42 percent annually.¹⁶ This legislation is narrow in scope in that it is inapplicable to loans over \$5,000; it does not require uniform disclosure of rates and charges; and it is inapplicable to credit sales.¹⁷ With the recognition that usury laws and small loan legislation were of no help to the consumer who purchased goods on credit, most states, beginning in 1950, passed retail installment sales acts.¹⁸ These acts provide only limited help to the consumer because most state retail installment acts are only applicable to certain goods and they do not require creditors to disclose credit terms to the consumer in a uniform manner.¹⁹

Although state usury laws, small loan legislation, and retail installment acts establish interest ceilings, they do not require creditors to provide consumers with a simple statement regarding the actual cost of the credit applicable to the consumer transaction.²⁰ In passing the Truth in Lending Act, Congress positively responded to the contention that consumers were entitled to know the cost of credit so that they could plan prudently and shop wisely.²¹ To this end, Congress expressly declared that the purpose of the Act was to assure a meaningful disclosure of credit terms so as to enable the consumer to compare more readily the various credit terms available to him and to avoid the uninformed use of credit.²²

The Act does not seek to regulate credit itself. Rather, it requires a creditor to disclose fully the terms of credit prior to consummating any consumer transaction.²³ Specifically, the Act's aim is to provide the consumer with two essential facts which are critical to any decision involving the use of credit.²⁴ The Act requires creditors to

¹⁵ *Id.* at 94-95. The time-price doctrine refers to the fact that merchants who sell goods on credit are not lenders. Because the cash paid over a period of time is not worth as much to a merchant as the same amount paid at the time of the purchase, the merchant must increase the price of the goods to make up for the loss. The credit charge merely represents the difference between the time price and cash price, thus distinguished from interest, which is a charge for the use of money. *Id.* at 95.

¹⁶ *Id.* In 1916 the Russel Sage Foundation drafted the Uniform Small Loan Act. HUBACHEK, ANNOTATIONS ON SMALL LOANS LAWS, 181-85 (1958). This Act became the model for the small loan legislation now in effect in 49 of the 50 states. Note, 22 CASE W. L. REV. 89, 95 (1970).

¹⁷ Note, 22 CASE W. L. REV. 89, 95-96 (1970).

¹⁸ *Id.* at 96.

¹⁹ *Id.* at 97. In fact, certain states' retail credit legislation only applies to the credit sales of automobiles. *Id.*

²⁰ *Id.*

²¹ H.R. REP. NO. 1040, 90th Cong., 2d Sess. 12, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1962, 1965.

²² 15 U.S.C. § 1601 (1970).

²³ TRUTH IN LENDING ACT: HEARINGS ON S. 5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 1-2 (1967) (statement of Senator William Proxmire).

²⁴ *Id.* at 2.

disclose the finance charge applicable to the transaction,²⁵ which comprises the sum of all direct and indirect charges imposed by the creditor incident to the extension of credit.²⁶ In addition, the Act requires the disclosure of an annual percentage rate,²⁷ or the rate which will yield an amount equal to the finance charge when applied to the unpaid balance of the amount financed.²⁸ It was thought that by providing the consumer with such information prior to the credit transaction, the consumer could more easily identify and compare credit terms and thus could make better use of his credit dollar.²⁹

Since the Act is remedial in nature, enforcement is of primary importance.³⁰ Congress created a tripartite enforcement scheme to ensure that creditors comply with the Act. The Act generally provides

²⁵ 15 U.S.C. § 1638(a) (1970).

²⁶ 15 U.S.C. § 1605(a) (1970), provides the following definition of finance charge: Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system or additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

See also Fed. Res. Bd. Reg. Z, 12 C.F.R. § 226.4 (1975).

²⁷ 15 U.S.C. § 1638(a) (1970).

²⁸ 15 U.S.C. § 1606 (1970), divides the determination of the annual percentage rate into two categories. 15 U.S.C. § 1606(a) (1) (1970), deals with the case of an extension of credit other than under an open end credit plan. The section allows creditors to determine the annual percentage rate by any method prescribed by the Federal Reserve Board or by following the formula prescribed in 15 U.S.C. § 1606(a)(1)(A) (1970), which provides:

The annual percentage rate applicable to any extension of consumer credit shall be determined, in accordance with the regulations of the Board . . . as that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed.

15 U.S.C. § 1606(a)(2) (1970), describes the manner in which the annual percentage rate is determined in the case of an extension of credit under an open end credit plan. The provision provides that the annual percentage rate shall be determined as the quotient of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year. *Id.* See also Fed. Res. Bd. Reg. Z, 12 C.F.R. §§ 226.5(a) & 226.5(b) (1976).

²⁹ 15 U.S.C. § 1601 (1970).

³⁰ See *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

for monitoring of the credit industry by administrative agencies,³¹ authorizes criminal proceedings in certain circumstances,³² and allows an aggrieved consumer to maintain a civil action against any person who violates the Act.³³

With respect to administrative monitoring of the credit industry, the Federal Reserve Board is entrusted with policing member banks of the Federal Reserve System.³⁴ In addition, seven other federal agencies are empowered to regulate creditors within their respective jurisdictions.³⁵ The second stratum of the Act's governmental enforcement scheme authorizes the initiation of criminal proceedings against any creditor who willfully and knowingly violates the Act.³⁶ The sanction for such a violation is a \$5,000 fine or a year in prison or both.³⁷ However, the criminal tier of the Act's enforcement device exists mostly as a threat, since there apparently has never been a conviction under this section.³⁸

Since governmental enforcement of the Act is primarily regulatory, the Act's private enforcement mechanism warrants special analysis. Concomitant with the powers vested in these governmental agencies, the Act provides the aggrieved consumer with the private remedies of rescission³⁹ and civil liability.⁴⁰ Since the rescission remedy is limited in scope in that it only applies when a creditor retains or acquires a security interest in a consumer's real property,⁴¹ civil liability has become the more effective enforcement mechanism. Under the Act, a creditor who fails to make a required disclosure is subject to liability for twice the finance charge up to \$1,000, but not less than \$100, plus reasonable attorneys' fees.⁴² Moreover, the Act waives the federal jurisdictional minimum by allowing an aggrieved consumer to bring an action in federal district court regardless of the amount in controversy.⁴³ Thus, the civil liability section plays a prominent role in

³¹ 15 U.S.C. § 1607 (1970).

³² *Id.* at § 1611.

³³ *Id.* at § 1640 (Supp. V 1975).

³⁴ *Id.* at § 1607(a)(1)(B) (1970). In addition to this enforcement responsibility, the Federal Reserve Board is authorized to promulgate regulations to carry out the purposes of the Act. *Id.* at § 1604. It has done so in a set of comprehensive regulations which are collectively known as Regulation Z. Fed. Res. Bd. Reg. Z. 12 C.F.R. § 226 (1976).

³⁵ 15 U.S.C. § 1607 (1970). These agencies include the Comptroller of the Currency, Bureau of Federal Credit Unions, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Civil Aeronautics Board, Interstate Commerce Commission, and Department of Agriculture. *Id.*

³⁶ *Id.* at § 1607(c).

³⁷ *Id.* at § 1611.

³⁸ The author's research has failed to discover any published cases involving a prosecution pursuant to 15 U.S.C. § 1611 (1970).

³⁹ 15 U.S.C. § 1635 (1970).

⁴⁰ *Id.* at § 1640 (Supp. V 1975).

⁴¹ *Id.* at § 1635 (1970).

⁴² *Id.* at § 1640(a) (Supp. V 1975).

⁴³ *Id.* at § 1640(e) (1970).

the Act's overall scheme by compensating those who choose to participate in the Act's enforcement.

The Act has no provision specifying the manner in which the public and private enforcement sections interrelate. It is obvious, though, that not every violation of the Act will be discovered by the administrative agency responsible for policing the industry in which the violation occurred. While the House believed that administrative enforcement of the Act would be preeminent because consumers lacked both the knowledge and the means of initiating civil suits,⁴⁴ nevertheless civil enforcement has been consistently encouraged.⁴⁵ Indeed, the civil liability section of the Act has been credited with creating a new species of private attorneys general to participate in the enforcement of the Act.⁴⁶

Under the Act, a creditor does not escape responsibility for its violation simply because it was not detected by the governing administrative agency. To the contrary, the creditor must always be aware of the possibility that a consumer will bring a civil action predicated upon the violation. Since the Act contains no requirement that a consumer prove that he was actually deceived by the disclosure error,⁴⁷ all credit consumers can potentially prosecute erring creditors. Because the Act creates a new species of private attorneys general, creditors testifying at the congressional hearings on the Act voiced particular concern with possible defenses.⁴⁸

The two branches of Congress were not in total agreement on the proper role of defenses under the Act's civil liability section. Many of the creditors who testified at the Senate hearings were disturbed that the original Senate bill contained no defenses to civil actions brought by consumers.⁴⁹ Much of the creditors' discontent was focused at disclosure of the annual percentage rate.⁵⁰ At an early point

⁴⁴ H.R. REP. NO. 1040, 90th Cong., 2d Sess. 14-15, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1965.

⁴⁵ *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *E.g.*, TRUTH IN LENDING: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 698 (1967).

⁴⁹ *Id.* at 381 (statement of Ralph Zaun). Mr. Zaun testified that in an irregular payment contract in which repayment is tailored to the income of the borrower, conversion tables are of little assistance. For instance, if a teacher who has income for only nine months of the year wishes to repay his loan in nine monthly installments annually, instead of twelve, then the annual percentage rate could not be computed according to the tables proposed by the Department of Treasury. *Id.* See also *id.* at 404 (1967) (statements of J.O. Elmer & William Kirchner).

⁵⁰ *Id.* at 698 (statement of the National Automobile Dealers Association). It was stated that creditors' costs of doing business will increase due to the difficulty of training employees in the computation of the annual percentage rate, particularly in the case of irregular payment contracts. Moreover, the dealers asserted that it would be a unique salesman indeed who could use the conversion tables to compute correctly the annual percentage rate. *Id.*

during the Senate subcommittee hearings on the bill, the Undersecretary of the Department of Treasury presented tables for creditors to use in computing the annual percentage rate.⁵¹ The Undersecretary testified that disclosure of an annual percentage rate is a simple process if creditors consistently employ the tables.⁵² However, several representatives of the credit industry disagreed with the Undersecretary's testimony by contending that the tables are of no assistance in computing the annual percentage rate applicable to an irregular payment contract.⁵³ Moreover, they argued that it was unlikely that creditors' clerical employees or salespeople would become proficient at using the tables and that it would seem particularly difficult for them to learn to compute independently the annual percentage rate applicable to an irregular payment contract.⁵⁴ Thus, creditors expressed the fear that under the Senate's bill creditors would be exposed to civil liability due to a computational error committed by one of its salespeople or clerical employees.⁵⁵

Although the Senate bill originally imposed strict liability for disclosure errors, the original House bill required proof of a knowing violation to establish civil liability.⁵⁶ The original bill provided that if a creditor erroneously disclosed the annual percentage rate, a presumption would arise that such violation was made knowingly.⁵⁷ The presumption may be rebutted if a creditor shows by a preponderance of evidence that the violation was not intentional and that it resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.⁵⁸ However, the requirement of a knowing violation was deleted from the House bill's final version in response to objections by the Justice Department that a knowledge requirement might frustrate prospective plaintiffs, and thereby weaken civil enforcement of the Act.⁵⁹

The final version of the original Act resolved this conflict by providing creditors with two defenses to civil actions. First, section 1640(b) provides that a creditor is not subject to civil liability if within fifteen days of discovering a disclosure error, and prior to the institution of an action under the Act or the receipt of a written notice of the error, the creditor notifies the consumer of the error and makes whatever adjustments are necessary to insure that the consumer will not have to pay a finance charge in excess of the amount or percent-

⁵¹ *Id.* at 64-67 (statement of Joseph Barr).

⁵² *Id.* at 67.

⁵³ *Id.* at 381 (statement of Ralph Zaun). See text accompanying note 41 *supra*.

⁵⁴ *Id.* at 698 (statement of the National Automobile Dealers Association).

⁵⁵ *Id.* The automobile dealers association called the Act's civil liability section "the sword of Damocles." *Id.*

⁵⁶ CONSUMER CREDIT PROTECTION ACT: HEARINGS ON H.R. 11601 BEFORE THE SUBCOMM. ON CONSUMER AFFAIRS OF THE HOUSE COMM. ON BANKING AND CURRENCY, H.R. DOC. NO. 1040, 90th Cong., 1st Sess. pt. 1, 24 (1967).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 902-03.

tage rate actually disclosed.⁶⁰ In addition, Congress provided creditors with a defense to civil actions predicated upon violations generated by certain *types* of errors. Section 1640(c) provides:

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Assuming that the complaints made by representatives of the credit industry have a basis in commercial reality, 1640(c) should be a creditor's most potent weapon to fend off civil liability. Unlike 1640(b), 1640(c) does not require a creditor to take swift action to correct the disclosure error, thus it is not as restrictive as 1640(b).⁶¹

⁶⁰ 15 U.S.C. § 1640(b) (1970) provides:

A creditor has no liability under this section for any failure to comply with any requirement imposed under this part, if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

⁶¹ *Id.* at § 1640. Congress passed an amendment to the Act in 1974 which gave creditors another defense to civil actions. 15 U.S.C. § 1640(f) (Supp. V 1975), provided:

No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

However, the section was again amended in 1976 and it now provides:

No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Act of Feb 27, 1976, Pub. L. No. 94-222, 90 Stat. 197. The 1974 amendment dramatically increased the authority of the Federal Reserve Board. It involved the Board in the Act's civil enforcement mechanism by allowing creditors to raise reliance upon Board opinions as a defense to civil action. Prior to the amendment, the spheres of enforcement were distinct and the majority of courts gave little effect to the fact that a particular violation was partially attributable to the erroneous advice of the Board. *E.g.*, *Ives v. W.T. Grant Co.*, 522 F.2d 749, 757-58 (2d Cir. 1975); *Scott v. Liberty Finance Co.*, 380 F. Supp. 475, 479 (D. Neb. 1974); *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121, 1123 (S.D. Ill. 1974). However, in assessing this result, Congress concluded that a creditor should not be forced to choose between the Board's construction of the Act and its own assessment of the way in which a court may interpret the Act. Accordingly, it proposed the above amendment as a solution. *Ives v. W.T. Grant Co.*, 522 F.2d 749,

II. THE ELEMENT OF INTENT

Many of the courts which have construed 1640(c) have given extensive consideration to the type of errors to which the section applies. Based upon a literal reading of the statute, virtually all courts have ruled that the error in question must be unintentional.⁶² Despite this relatively uniform conclusion, 1640(c)'s intent element has been the subject of two different modes of analysis.

The construction of intent which has been followed by a majority of courts was first advanced by the Southern District of New York in *Ratner v. Chemical Bank New York Trust Co.*⁶³ The court in *Ratner* ruled that the defendant-bank had violated the Act when it failed to disclose the annual percentage rate or nominal annual percentage rate on the consumer's monthly statement pursuant to a Master Charge Card Agreement.⁶⁴ After determining that the bank had violated the Act, the court then considered whether the error was among the type excused by 1640(c).⁶⁵ The court asserted that 1640(c) establishes a standard which requires both that the error in question be unintentional and that it occur notwithstanding the maintenance of procedures reasonably adapted to avoid it.⁶⁶ The court found that in omitting the disclosure from its monthly statement, the bank had not simply overlooked an incomplete statement, but rather, had mistaken the Act's requirements. Thus, the error in question occurred intentionally.⁶⁷ To buttress its conclusion, the court asserted that in light of the Act's legislative history, 1640(c) was meant to absolve only clerical errors. The defense is wholly inapposite to errors of law such as that in the instant case.⁶⁸

Whereas the *Ratner* court essentially ruled that the intentional aspects of 1640(c) go to the acts and omissions of a creditor, the

758 (2d Cir. 1975), citing SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, TRUTH IN LENDING ACT AMENDMENTS [s. 2101], S. REP. NO. 93-278, 93d Cong., 1st Sess. 13. This amendment proved to be a panacea because a creditor could insulate itself from civil liability by simply soliciting and following the advice of the Board. The civil remedy would have been emasculated if Congress had not again amended the section. Thus, Congress restricted the scope of the defense by adding the requirement that the interpretation relied upon must have been issued by an agent of the Board duly authorized to promulgate such opinions. Act of Feb. 27, 1976, Pub. L. No. 94-222, 90 Stat. 197. See also *Lewis v. Walker-Thomas Furniture Co.*, 416 F. Supp. 514, 518 (D.D.C. 1976).

⁶² E.g., *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 877 (7th Cir. 1976); *Ives v. W.T. Grant Co.*, 522 F.2d 749, 757 (2d Cir. 1975); *Haynes v. Logan Furniture Mart Inc.*, 503 F.2d 1161, 1166-67 (7th Cir. 1974); *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971); *Ratner v. Chemical Bank Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971).

⁶³ 329 F. Supp. 270 (S.D.N.Y. 1971).

⁶⁴ *Id.* at 278.

⁶⁵ *Id.* at 281.

⁶⁶ *Id.*

⁶⁷ *Id.* In concluding that a mistake of law does not make a creditor's actions any less intentional, the court analogized to the criminal law. *Id.*

⁶⁸ *Id.* at 280-81.

Northern District of Georgia proposed a contrary construction of intent in *Welmaker v. W. T. Grant Co.*⁶⁹ Although the *Welmaker* court found that a coupon credit system widely used by defendant violated the Act by omitting seven different required disclosures, the court ruled that the violations fell squarely within the defense provided by 1640(c).⁷⁰ The court was persuaded that defendant did not intend to violate the Act, and that the violations resulted from bona fide errors notwithstanding the fact that defendant maintained procedures reasonably adapted to avoid such errors.⁷¹ In reaching this decision, the court took issue with *Ratner's* construction of intent.⁷² The court criticized *Ratner's* reference to 1640(c)'s legislative history, finding that recourse to the legislative history was unnecessary in light of 1640(c)'s plain language.⁷³ Specifically, the court stated that intent, as used in 1640(c), does not refer to an intent to do an act but rather to an intent to break the law.⁷⁴ Thus, according to the *Welmaker* court, when a creditor invokes 1640(c), the issue simply is whether the defendant intended to violate the Act. The *Welmaker* court distinguished *Ratner* as being an overly narrow construction of 1640(c).⁷⁵

Applying this broader construction of 1640(c) to the instant facts, the court ruled that W. T. Grant Co. did not intend to violate the Act.⁷⁶ The court supported its finding by pointing to testimony given by defendant's agents which tended to show that the violations in question were partially attributable to defendant's misplaced reliance upon a misleading pamphlet issued by the Federal Reserve Board.⁷⁷ Moreover, the court considered the fact that defendant had consulted both the Federal Reserve Board and the Federal Trade Commission prior to initiating its coupon plan and that both agencies had at least tacitly approved the plan.⁷⁸ Since the court determined that 1640(c) contemplates a creditor's motive, state of mind, and intention to violate the law, the court ruled that defendant's efforts to

⁶⁹ 365 F. Supp. 531 (N.D. Ga. 1972).

⁷⁰ *Id.* at 540, 543. Under this coupon system, the customer obtained a book of coupons which he could later exchange for merchandise at any Grant store. The coupons varied in denominations from 25 cents to \$10 and the books ranged in value from \$20 to \$200. The coupons could be exchanged for merchandise any time after purchase. When a customer exchanged a coupon, his obligation accrued and a finance charge was levied. *Id.* at 534.

⁷¹ *Id.* at 543.

⁷² *Id.* at 544.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 543.

⁷⁷ *Id.* at 540-41. Defendant made certain terminology changes in its retail installment sales contract based on suggestions contained in a pamphlet published by the Federal Reserve Board. These changes were later found to be violative of Regulation Z. *Id.*

⁷⁸ *Id.* at 541-43. Specifically, Grant Credit Contract Forms were submitted to the Federal Trade Commission for its review on three separate occasions. The forms were also reviewed by the Federal Reserve Board. Neither of these agencies ever advised defendant that its credit contract violated the Act. *Id.*

comply with the Act brought defendant within 1640(c)'s confines.⁷⁹

Arguments reflecting these conflicting constructions of intent were presented to the Seventh Circuit in *Haynes v. Logan Furniture Mart, Inc.*⁸⁰ The district court in *Haynes* had found that defendant's retail installment contract violated seven specific provisions of the Act,⁸¹ but nevertheless upheld defendant's 1640(c) defense because it concluded that defendant had relied upon the mistaken advice of counsel.⁸² In reaching this conclusion, the district court reasoned that intent, as employed in 1640(c), was directed to the violation of the law itself rather than to the acts which constitute violations of the law.⁸³

The Seventh Circuit reversed, opting for the *Ratner* construction of intent.⁸⁴ In adopting *Ratner* and dismissing the *Welmaker* rationale, the court of appeals asserted that any construction of 1640(c) which claims that its intent element refers to an intent to violate the law necessarily equates the term with a knowing and willful violation.⁸⁵ However, the court noted that "knowing and willful" is the standard for establishing criminal liability under the Act.⁸⁶ Thus, the court concluded that intent, as used in 1640(c), can not mean an intent to violate the Act but must necessarily refer to an intent to do an act which results in a disclosure violation.⁸⁷

Besides employing a contextual analysis, the court also relied upon 1640(c)'s express language and legislative history to support its conclusion that 1640(c) encompasses only clerical errors.⁸⁸ With regard to the former, the court asserted that the Act's provision requiring creditors to take due care to create procedures to avoid error is an obvious reference to internal controls.⁸⁹ Such a reference in a law mandating the presentation of many exact figures and percentages unique to each transaction plainly suggests that 1640(c) was intended to encompass basically only clerical errors.⁹⁰ In conjunction with this assertion, the court stated 1640(c)'s legislative history shows that the section was included in the Act only after creditors complained that clerical and mathematical errors would inevitably result as a conse-

⁷⁹ *Id.* at 543.

⁸⁰ 503 F.2d 1161 (7th Cir. 1974).

⁸¹ *Id.* at 1162 n.1. The trial court found that the defendant failed to make specific disclosures required by subparagraphs (b)(2), (b)(3), (c)(2), (c)(3), (c)(5), (c)(7), and (c)(8)(ii) of 12 C.F.R. § 226.8 (1976). The court further found that the computation of any unearned finance charge in the event of prepayment was not identified, a violation of 12 C.F.R. § 226.8(b)(7) (1976). In addition, no disclosure was made that insurance coverage was not required, a violation of 12 C.F.R. § 226.4(a)(5) (1976).

⁸² *Id.* at 1162.

⁸³ *Id.* at 1166.

⁸⁴ *Id.* at 1166-67.

⁸⁵ *Id.* at 1166.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1166-67.

⁸⁸ *Id.* at 1167.

⁸⁹ *Id.*

⁹⁰ *Id.*

quence of the complexity of annual rate computations.⁹¹

Since the goal of the Act is to promote the informed use of consumer credit, the Seventh Circuit in *Haynes* properly adopted *Ratner's* construction of intent. If the court had adopted the *Welmaker* construction, creditors could only be found civilly liable if the consumer sufficiently proved that the creditor intended to violate the Act. A construction of 1640(c) which places such an inordinate burden on the consumer renders the Act's civil remedy hollow.⁹² Establishing a knowing and willful standard for civil liability would also frustrate the Act's goal of full disclosure because under such a construction creditors could take minimum efforts to provide the consumer with the required disclosures and still elude civil liability.

In light of the Act's express language and legislative history, the *Haynes* court's comparison of the civil and criminal sanctions of the Act lends weight to its conclusion that 1640(c)'s intent requirement refers to an intent to do an act and not to an intent to break the law. If a consumer bringing a civil action under the Act were required to prove that the creditor intended to violate the Act in order to prevail, the Act's criminal section would be little more than a redundancy. Further, since the original House bill required a knowing violation to sustain a finding of civil liability,⁹³ and since this requirement was deleted from the bill's final version in response to complaints registered by the Justice Department that a knowing requirement would weaken civil enforcement,⁹⁴ it is apparent that intent as used in 1640(c) was not meant to signify an intent to violate the Act. Moreover, the *Haynes* holding is consistent with the Act's enforcement scheme because it diminishes the vigor of 1640(c) and thereby promotes private enforcement.

Closely following the reasoning of *Ratner*, the Seventh Circuit in *Haynes* concluded that 1640(c) offers no shelter from liability for a defendant whose error was not clerical in nature.⁹⁵ Although both *Ratner* and *Haynes* claimed that 1640(c)'s express language and its legislative history clearly show that the defense went to clerical errors alone, neither opinion gave much indication as to the type of errors envisioned by the phrase. Since *Ratner* and *Haynes* ruled that clerical errors are the only errors that are unintentional for purposes of 1640(c), this comment next will consider the definition of "clerical error" by examining two essential components: the identity of the person who committed the error, and the specific nature of the error which produced the violation.

⁹¹ *Id.*

⁹² *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1248 (N.D. Ga. 1971).

⁹³ CONSUMER CREDIT PROTECTION ACT: HEARINGS ON H.R. 11601 BEFORE THE SUBCOMM. ON CONSUMER AFFAIRS OF THE HOUSE COMM. ON BANKING AND CURRENCY, H.R. DOC. NO. 1040, 90th Cong., 1st Sess. pt. 1, 24 (1967).

⁹⁴ *Id.* at 902-03.

⁹⁵ 503 F.2d at 1167.

A. *The Identity of the "Clerk" Committing the Error*

A clerical error, literally, is one that is made by a clerk. As a matter of practice, since the Act encompasses both straight loans and credit sales, it is usually a junior loan officer or salesperson who is charged with the responsibility of making the required disclosures.⁹⁶ Although most creditors employ preprinted form agreements, it is the responsibility of the loan officer or salesperson to complete the form by inserting, *inter alia*, the amount of the finance charge, the number of monthly payments, and the annual percentage rate. Although the finance charge and the number of monthly payments are matters of simple arithmetic, conversion tables must normally be used in determining the annual percentage rate.⁹⁷ After this computation is made and the amounts transposed to the credit form, the consumer usually signs the agreement and each party retains a copy.

As was noted above, at the Senate subcommittee hearings on the Act, creditors expressed doubts that their employees could be trained either to use the rate conversion tables proficiently or to compute the annual percentage rate independently.⁹⁸ For example, one witness testified that in Massachusetts, a state in which a truth-in-lending act had been in effect prior to the Act's passage,⁹⁹ officers of several department stores had complained that the act was causing problems for their clerical employees.¹⁰⁰ Another witness advocated the inclusion of exemptions in the Act to excuse the mathematical errors of a loan officer,¹⁰¹ while yet another expressed the fear that an automobile salesman could not be expected to compute accurately the annual percentage rate applicable to an irregular payment contract.¹⁰² It would seem, then, that the Act's legislative history suggests that many of the complaints which led Congress to include 1640(c) in the Act were directed at errors made by the lower level employees of a credit enterprise.

While not expressly referring to 1640(c)'s legislative history, the Southern District of New York in *Sambolin v. Klein Sales Co.*¹⁰³ considered whether a creditor's failure to fill in a blank space on its retail

⁹⁶ See TRUTH IN LENDING ACT: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 381 (1967) (statement of Ralph Zaun).

⁹⁷ See CONSUMER CREDIT PROTECTION ACT: HEARINGS ON H.R. 11061 BEFORE THE SUBCOMM. ON CONSUMER AFFAIRS OF THE HOUSE COMM. ON BANKING AND CURRENCY, H.R. DOC. NO. 1040, 90th Cong., 1st Sess. pt. 1, 77 (1967).

⁹⁸ TRUTH IN LENDING ACT: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 226 (1967) (statement of Paul Menton).

⁹⁹ MASS. GEN. LAWS ANN., ch. 140C (1969).

¹⁰⁰ TRUTH IN LENDING ACT: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 226 (1967) (statement of Paul Menton).

¹⁰¹ *Id.* at 374-81 (statement of Ralph Zaun).

¹⁰² *Id.* at 698 (statement of National Automobile Dealers Association).

¹⁰³ 5 CONS. CRED. GUIDE (CCH) ¶ 98,432 at 87,858 (S.D.N.Y. 1976).

installment contract, which would have apprised the consumer of the number of payments required under the agreement, was an excusable violation under 1640(c).¹⁰⁴ As a matter of law, the court ruled that 1640(c) was inapplicable since the form containing the disclosures and the omission was used not by a low-level employee, but by a sole proprietor.¹⁰⁵ As such, the court refused to characterize the error in question as clerical.¹⁰⁶ Thus, the court was cognizant of the identity of the person committing the error and this awareness played some part in its decision to disallow a 1640(c) defense.¹⁰⁷ Similarly, in *Gerasta v. Hibernia National Bank*,¹⁰⁸ consumers brought a civil action alleging that the defendant-bank failed to notify them of their right to rescind the credit agreement as required by Regulation Z.¹⁰⁹ Specifically, the complaint charged that the bank's manager who drafted the disclosure statement inserted the wrong rescission date on the statement.¹¹⁰ In deciding whether 1640(c) applied, the court took cognizance of the fact that it was the bank's manager who was responsible for committing the error.¹¹¹ As such, the court held that the error could not be considered clerical.¹¹²

These two cases, along with the legislative history of 1640(c), demonstrate that the identity of the person committing the error is an important factor in deciding whether to allow a 1640(c) defense. Consideration of this factor is warranted because, limiting 1640(c) to errors committed by low-level employees comports with the remedial nature of the Act. Specifically, the proposed identity limitation fosters private enforcement by further constricting the applicability of the 1640(c) defense. Yet, the inquiry into whether a particular disclosure violation was caused by a clerical error is not terminated simply by determining the identity of the person responsible. Rather, the exact nature of the error must be explored before the "clerical error" label can be attached.

B. *The Nature of Clerical Error*

An examination of the Senate subcommittee hearings on the Act reveals that most of the arguments against the Act's passage focused upon the problem of requiring disclosure of the annual percentage rate.¹¹³ Creditors generally feared that disclosing an annual percent-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 411 F. Supp. 176 (E.D. La. 1976).

¹⁰⁹ *Id.* at 181.

¹¹⁰ *Id.* at 189-90.

¹¹¹ *Id.*

¹¹² *Id.* at 189-90 n.41.

¹¹³ TRUTH IN LENDING ACT: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 374, 698 (1967).

tage rate, either by calculating it independently or by transposing it from a table, would inevitably produce computational errors which would lead to civil liability.¹¹⁴ Thus, 1640(c) has been said to exist principally in response to creditor apprehension over computational errors in disclosing the annual percentage rate.¹¹⁵ A close reading of those cases which have held that 1640(c) excuses only clerical errors provides further insight into the type of error to which the phrase refers. Several courts have suggested that a clerical error is computational, arithmetical, typographical, or transpositional.¹¹⁶ As an aggregate, these cases indicate that a clerical error occurs when something goes wrong in computing the annual percentage rate. The Act's legislative history and these cases thus pose the issue of whether the 1640(c) defense is limited to errors committed in computing the annual percentage rate.

The Fifth Circuit in *Turner v. Firestone Tire & Rubber Co.*¹¹⁷ considered whether defendant's failure to fill in a blank on a disclosure statement provided to inform the consumer of the cost of credit life insurance was defensible under 1640(c). Although the court ruled that defendant had no recourse to 1640(c) since it failed to produce any evidence that it maintained procedures to avoid errors,¹¹⁸ the court intimated in dicta that defendant's failure to fill in the blank might be the typical clerical error at which 1640(c) is aimed.¹¹⁹

The dicta in *Turner* is supported neither by the Act's legislative history nor by the broader purposes of the Act. Since a preponderance of the testimony at the Senate subcommittee hearings which advocated exemptions from civil liability was levelled at the annual percentage rate,¹²⁰ an expansion of section 1640(c) to encompass errors other than those committed in disclosing the annual percentage rate is unwarranted. Moreover, *Turner's* suggested expansion of 1640(c) is inappropriate because of the Act's broadly remedial purpose and its policy favoring private enforcement. Section 1640(c) represents a limited concession to creditors who specifically complained about the difficulty of disclosing accurately the annual percentage rate.¹²¹ Since the goal of the Act is to require creditors to provide consumers with sufficiently understandable information to make an informed deci-

¹¹⁴ *Id.*

¹¹⁵ *Ratner*, 329 F. Supp. at 281 n.17.

¹¹⁶ See, e.g., *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 20 n.7 (E.D. Va. 1975); *First Nat'l City Bank v. Drake*, [1969-73 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶98,939 at 88,653 (N.Y. Civ. Ct. 1973).

¹¹⁷ 537 F.2d 1296, 1297 (5th Cir. 1976).

¹¹⁸ *Id.* at 1297. See 15 U.S.C. § 1640(c) (Supp. V 1975), which requires the maintenance of procedures reasonably adapted to avoid error. See discussion in text at notes 123-47 *infra*.

¹¹⁹ See *Turner*, 537 F.2d at 1297.

¹²⁰ See TRUTH IN LENDING ACT: HEARINGS ON S.5 BEFORE THE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING AND CURRENCY, S. DOC. NO. 392, 90th Cong., 1st Sess. 226, 374, 426-27, 529, 584, 698 (1967).

¹²¹ *Id.*

sion, the deprivation of necessary information frustrates the Act's purposes. In light of the Act's overall philosophy and 1640(c)'s legislative history, a creditor should be allowed to escape liability for violating the Act only if its violation is attributable to an annual percentage rate error.

Additionally, restricting 1640(c) to errors made in disclosing the annual percentage rate makes sense in a commercial context. Errors committed in computing the annual percentage rate occur spontaneously, often within the presence of the consumer. Since most consumers want to complete their credit transactions as quickly as possible, there is at least tacit pressure to disclose the annual percentage rate swiftly. Due to the complexity of the conversion tables which most creditors use to compute the rate and to the possibility that in some irregular payment contracts either a special table must be used or the rate must be computed independently, spontaneous calculation of the annual percentage rate could result in an erroneous disclosure. Thus, limiting 1640(c) to annual percentage rate errors has a sound basis in commercial reality.

The identity of the person committing the error as well as the specific nature of the error in question are two significant considerations in determining whether an error is clerical. However, the inquiry into the merits of a 1640(c) defense does not terminate with these considerations because the statute requires creditors to prove that they maintained procedures reasonably adapted to avoid errors.¹²² Thus, analysis of 1640(c) may conveniently commence with the nature of the error committed but it concludes with the determination of whether a particular creditor maintained procedures designed to detect clerical errors.

III. THE MAINTENANCE ELEMENT

Rather than exempting errors in disclosing annual percentage rates from civil liability altogether, Congress chose to require creditors to prove, as a matter of defense, that they have maintained procedures reasonably adapted to avoid error. Consistent with the congressional attempt to change the philosophy of the credit industry from "let the buyer beware" to "let the seller disclose,"¹²³ and in light of the policy favoring private enforcement, the creditor's burden of proof is heavy. However, Congress remained silent as to the type of procedures that might satisfy 1640(c)'s maintenance requirement, and thus left the matter open to judicial determination. This section will first discuss the type of showing necessary to meet the statutory "maintenance" requirement. Additionally, various rechecking systems will be proposed as means for satisfying this requirement. Finally, since a creditor's decision as to which type of rechecking system it should

¹²² See discussion in text at notes 123-47 *infra*.

¹²³ *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973).

employ ultimately depends upon the system's cost, the cost factor will be analyzed in light of 1640(c)'s overall structure. Although judicial construction of section 1640(c)'s maintenance requirement places a heavy burden of proof on the creditor, it will be concluded that the burden of establishing a consistently maintained rechecking procedure comports with the Act's goal of preventing consumers from being exposed to incomplete, misleading, or erroneous credit information.

The Seventh Circuit in *Mirabal* was the first court to undertake an analysis of 1640(c)'s maintenance requirement.¹²⁴ The undisputed facts of the case reveal that the controversy arose out of a credit purchase of a new automobile.¹²⁵ The consumers financed their purchase through GMAC and the terms of the transaction were contained in a mutually executed retail installment sales agreement.¹²⁶ The installment agreement disclosed an annual percentage rate of 11.08 percent, whereas the rate which was actually applicable to the transaction was 12.83 percent.¹²⁷ The consumers brought a civil action under the Act based primarily on the fact that the installment agreement disclosed an erroneous annual percentage rate.¹²⁸ They obtained a favorable judgment from the district court, from which the creditors appealed.¹²⁹ On appeal, the Seventh Circuit reexamined the application of section 1640(c) to the facts, and affirmed the district court. The court of appeals first noted that under 1640(c) a creditor must prove both that the violation at issue was unintentional and that it maintained procedures reasonably adapted to avoid errors.¹³⁰ The court summarily ruled that defendants' error was unintentional, and thus proceeded to consider whether defendants met 1640(c)'s maintenance requirement.¹³¹

In treating this issue, the court initially referred to defendants' brief which described the procedures initiated in order to comply with the Act. These procedures included the fact that the automobile dealer employed specially trained office personnel to assist its salesmen in determining annual percentage rates, that GMAC provided the automobile dealers with special rate charts and tables to assist them in computing the annual percentage rates, and that GMAC dis-

¹²⁴ *Mirabal*, 537 F.2d at 876-79.

¹²⁵ *Id.* at 874.

¹²⁶ *Id.* The *Mirabals* had no direct dealings with GMAC. The district court found, however, that because the automobile dealer arranged for the extension of credit while GMAC actually extended the credit, both defendant-GMAC and defendant-dealer were creditors under the Act. *Id.* at 874 n.1.

¹²⁷ *Id.* at 874.

¹²⁸ *Id.*

¹²⁹ *Id.* The district court found seven specific violations of the Act. For each violation of the Act the court assessed damages of \$1000 against the defendants. The district court also found that defendants had violated Illinois law and thus rendered a judgment in excess of \$8,000. *Id.* The Seventh Circuit reversed the district court's finding that defendants had violated the state laws and reduced the final judgment to \$2,000 plus costs and attorney's fees. *Id.* at 885.

¹³⁰ *Id.* at 877.

¹³¹ *Id.*

tributed a manual to its dealers which emphasized the need for the accurate disclosure of annual percentage rates.¹³² The court then noted that defendants' procedures were impressive and that such procedures were clearly designed to disclose accurately the applicable annual percentage rates.¹³³ However, the court asserted that a mere showing that such procedures existed did not resolve the issue of whether defendant met the statutory maintenance requirement of section 1640(c).¹³⁴

The court found that 1640(c) required more than the mere maintenance of procedures which have been designed to provide proper disclosure calculations. It concluded that an essential element of the maintenance procedure which Congress had in mind when creating 1640(c) was an extra preventive step, a safety catch, or a re-checking mechanism.¹³⁵ Since the statute requires the implementation of mechanisms designed to avoid and prevent errors which might otherwise slip through procedures merely aimed at good faith compliance, the court postulated that 1640(c) requires more than just a showing that a well-trained and careful clerk made a mistake. Rather, the court suggested that section 1640(c)'s maintenance provision required either the first well-trained clerk's figuring be checked by a second well-trained clerk or that the clerk who made the calculations on an adding machine subsequently checked the figures by looking up the figures on a table.¹³⁶ Further, the court determined that section 1640(c) required a showing that the rechecking or other preventive device had been *consistently* maintained by the creditor.¹³⁷

Applying this standard to the facts of *Mirabal*, the court found that the defendants had made neither of these showings.¹³⁸ While defendants' procedures were probably designed to provide correct disclosures, they did not contain any type of preventive mechanism for detecting disclosure errors. Further, the defendants did not sufficiently prove that these procedures were consistently maintained. In fact, the defendants apparently did not seem to know what procedures were followed in generating the annual percentage rate for the *Mirabals'* contract.¹³⁹ Accordingly, the court held that defendants were liable to the consumers because they had failed to establish their right to an exemption under 1640(c).¹⁴⁰

¹³² *Id.*

¹³³ *Id.* at 877-78 n.9. The defendants pointed out that on a proper conversion table the correct percentage rate of 12.83 percent is just one column above the percentage rate disclosed of 11.08 percent. Thus, they suggested that in going across this table to find the correct rate, the slip of only a single line could have resulted in the error.

Id.

¹³⁴ *Id.* at 878.

¹³⁵ *Id.*

¹³⁶ *Id.* at 878-79.

¹³⁷ *Id.* at 879.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Mirabal is significant because it gleaned a two-pronged test from 1640(c)'s maintenance requirement. According to *Mirabal*, a creditor invoking a 1640(c) defense must prove not only that it had established procedures which included a preventive mechanism, but also that these procedures were consistently followed.¹⁴¹ The significance of this dual requirement is particularly illustrated by the fact that prior to *Mirabal*, most of the courts which had tangentially referred to 1640(c)'s latter clause made no mention of maintenance. The *Ratner* court, for example, declared that 1640(c)'s maintenance clause required a creditor to prove that due care was taken to *set up* procedures to avoid clerical errors.¹⁴² Similarly, the Second Circuit in *Ives v. W.T. Grant Co.*¹⁴³ suggested that the maintenance requirement would be satisfied if a creditor proved that it *established* procedures reasonably adapted to avoid error. Even the earlier Seventh Circuit decision in *Haynes* interpreted maintenance as requiring a creditor to prove that it used due care in *creating* procedures designed to avoid errors.¹⁴⁴

Mirabal, however, represents a more appropriate construction of 1640(c)'s maintenance clause. By placing an extremely high burden upon a creditor invoking 1640(c), the *Mirabal* standard serves to effectuate the general disclosure policy of the Act. The *Mirabal* standard requires creditors to do everything reasonably possible to avoid disclosure errors, thereby diminishing the efficacy of 1640(c) as a creditor defense.¹⁴⁵ Further, *Mirabal's* holding serves as a notice to creditors of what 1640(c)'s much ignored maintenance clause requires by establishing that a well-maintained rechecking system would comply with the section,¹⁴⁶ and by suggesting two rechecking procedures which would satisfy the maintenance requirement.¹⁴⁷

A. Rechecking Systems

Even though the *Mirabal* court made the specific suggestion that a rechecking system would satisfy the maintenance element of 1640(c), the opinion is silent as to what procedures, other than rechecking, satisfy 1640(c)'s maintenance requirement. Since *Mirabal* did not provide a catalog of possible rechecking mechanisms, various rechecking systems will be suggested as means of satisfying 1640(c)'s maintenance requirement. Moreover, it will be concluded that the decision as to which rechecking system to institute depends upon the size of the enterprise and whether it is primarily engaged in the extension of consumer credit. Although *Mirabal* suggests that other preventive proce-

¹⁴¹ *Id.*

¹⁴² *Ratner*, 329 F. Supp. at 281.

¹⁴³ 522 F.2d 749, 757 (2d Cir. 1975).

¹⁴⁴ 503 F.2d at 1167.

¹⁴⁵ 537 F.2d at 879.

¹⁴⁶ *Id.* at 879 n.14.

¹⁴⁷ *Id.* at 878-79.

dures might satisfy the requirement, it also asserts that in some instances rechecking is the only way to avoid clerical error.¹⁴⁸ The defendants in *Mirabal* admitted that the erroneous rate disclosure would not have been obvious when it occurred, and the court agreed that this would be the case whenever the annual percentage rates differ by only small amounts.¹⁴⁹ However, since even the most highly trained person makes mistakes, the court asserted that rechecking is the *only* way to detect minor discrepancies in the annual percentage rate.¹⁵⁰ Since "clerical error" refers to an error in disclosing the annual percentage rate and *Mirabal* suggests that minor rate variations can only be detected by rechecking, it would seem that creditors should implement and maintain rechecking systems if they want to insure recourse to 1640(c). Since a rechecking system could take a variety of forms, creditors should institute a system that is reasonable in light of both the total amount of the credit they extend and in terms of the number of credit transactions into which they enter.

As a matter of theory, there are an infinite variety of rechecking systems which would satisfy 1640(c). However, the size of the credit enterprise is an excellent index as to the merits of any particular system. Since it has been suggested that 1640(c) is limited to excusing only errors made in disclosing an annual percentage rate, particular attention will be paid to that disclosure. However, a rechecking system which is designed to detect not only rate errors but also general disclosure violations could shield creditors from civil liability under the Truth in Lending Act.

For those creditors who extend a significant amount of credit annually, such as banks and loan companies, compliance with 1640(c)'s maintenance requirement could include creating a special department to review retail sales agreements or loan disclosure statements to determine whether they comport with the requirements of the Act.¹⁵¹ Although particular attention could be focused upon disclosure of the annual percentage rate, the entire disclosure statement could be examined by these departments. If a creditor is engaged in retail sales, each retail installment agreement would be submitted to the creditor's special rechecking department before the agreement is given to the consumer for signature. Under such a system, the person making the sale would prepare the retail installment sales agreement and compute the annual percentage rate. After preparing the agreement, the salesperson would then submit it to the special rechecking department whose personnel would examine the document, recalcu-

¹⁴⁸ *Id.* at 879 n.14.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *Gerasta v. Hibernia Nat'l. Bank*, 411 F.Supp. 176, 183 n.15 (E.D.La. 1976). The defendant-bank had assigned a special section with the responsibility of examining truth-in-lending documents for errors in computation. *Id.* at 183. Its manager testified that occasionally errors were discovered before the disclosure documents were given to the consumer. *Id.* at 183 n.15.

late the annual percentage rate by rechecking the conversion tables, and determine whether the statement or agreement contained any disclosure violations. The department would approve the document and advise the salesperson that it was ready for signature.

Particularly large creditors may want to consider other alternatives. It is certain that a computer could be appropriately programmed to detect disclosure errors. Under such a system, after a salesperson or loan officer completed the credit agreement, the form could then be fed into the computer. The computer could ascertain whether the document contained all the required disclosures and could independently compute the annual percentage rate. If the agreement contained an error, the error could be brought to the employee's attention. The employee could then correct the error and resubmit the corrected agreement to the computer for a final check. Thus, the rechecking process would consume only minutes.

On a smaller level, however, creditors who do not extend a large amount of credit could either train a few of their present employees to review credit documents or they could hire a few specially trained personnel to review credit transactions. With regard to the former, a bookkeeper or other salesperson could routinely examine credit documents to determine whether they comply with the Act. The problem with this rechecking system is that the procedures may seem so casual that they may eventually fall into disuse. With regard to the latter, the system would function as a small-scale rechecking department.¹⁵² Alternatively, a small creditor could train all its employees to use either the rate conversion tables or to compute the annual percentage rate independently.¹⁵³

Although all of these procedures may suffice as rechecking devices for purposes of the first prong of the *Mirabel* standard, a creditor must also prove under *Mirabel* that it consistently adhered to the rechecking system.¹⁵⁴ Therefore, in order to maintain a valid 1640(c) defense, a creditor must demonstrate more than the fact that a rechecking system exists. 1640(c)'s maintenance requirement obliges a creditor to prove specifically that a rechecking mechanism was in systematic operation at the time a particular disclosure error occurred. At least one court has interpreted this provision as requiring a creditor, at a minimum, to introduce an affidavit of a bookkeeper or office manager which details the procedures that were followed at the time of the transaction in question.¹⁵⁵ Because of the maintenance re-

¹⁵² See discussion of rechecking in text at notes 148-51 *supra*.

¹⁵³ This proposed system may make more commercial sense for those enterprises which are primarily involved in the finance business than it does for retail sales creditors, because most of the employees of a loan company have received specialized training and have a degree of proficiency in the finance business. This, however, is not true of the average salesperson.

¹⁵⁴ *Mirabel*, 537 F.2d at 879. See discussion of maintenance in text at notes 148-51 *supra*.

¹⁵⁵ *Pitkin Furniture Co. v. Jackson*, [1969-73 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶99,231 at 89,190 (N.Y. Civ. Ct. 1972).

quirement and the problems of proof which it raises, these problems could be alleviated if a creditor established and maintained one particular system of rechecking instead of rechecking rate computations by a variety of different methods. If a creditor creates a special department to examine credit documents, then *all* credit transactions should be referred to this department. Thus, when a dispute arises it will be much easier for the creditor to prove the procedures it followed in preparing the disclosure statement in question.

The wisdom of requiring creditors to maintain a rechecking system is best judged against the objectives of the Act.¹⁵⁶ Since it was Congress' intention in passing the Act to require creditors to do everything reasonably possible to comply with the Act, requiring creditors to institute rechecking systems is consistent with this remedial spirit because a rechecking system will obviously detect disclosure violations. In other words, the rechecking requirement is an additional means of ensuring that the consumer receives the disclosures to which he is statutorily entitled. Although an argument may be made that a requirement which forces creditors to establish and maintain elaborate rechecking mechanisms ultimately may increase the cost, and hence the price, of credit, such an argument should not deter the courts from requiring creditors to establish and maintain consistently procedures designed to detect disclosure errors. First, since interest charges and finance charges are often fixed by statute, any increase in the price of credit will be subject to control.¹⁵⁷ Second, the consumer orientation of the Act as reflected in its broadly remedial spirit supports the proposition that a rechecking requirement is consistent with the Act's philosophy.

B. *The Cost Factor*

By its terms, 1640(c) requires creditors to maintain procedures which are *reasonably* adapted to avoid error. In determining whether a particular rechecking system complies with 1640(c), cases suggest that the cost of the system should be considered as an element of the term reasonable. Thus, what may be a reasonable rechecking system for a

¹⁵⁶ The prudence of *Mirabal's* proposed rechecking requirement was questioned by Judge Moore in his dissent in *Mirabal*, 537 F.2d at 886 (Moore, J., dissenting). The dissent claimed that the majority opinion in *Mirabal* was predicated upon the belief that defendants should have maintained a more error-proof bookkeeping department. *Id.* This assertion implicitly questions the propriety of the judiciary becoming involved in substantive lawmaking. The court in *Mirabal* did indeed closely scrutinize defendants' disclosure procedures to determine whether they were adequately maintained. It is submitted, however, that this inspection was warranted because the Act left the definition of 1640(c)'s maintenance requirement for judicial construction. Thus, according to *Mirabal*, it is in fact proper for federal courts to fill in the interstices of the Truth in Lending Act. Moreover, *Mirabal's* construction of 1640(c)'s maintenance provision as requiring the institution and rigorous adherence to rechecking systems comports with the broadly remedial spirit of the Act.

¹⁵⁷ See discussion in text at notes 13-19 *supra* concerning state usury laws.

large bank is not necessarily reasonable for a small retail outlet.

In suggesting rechecking as a means of satisfying 1640(c), the *Mirabal* court noted that requiring creditors to implement a rechecking system does not place a great burden upon creditors.¹⁵⁸ The court claimed that checking a chart takes only a minute and making computations on an adding machine is also a quick process.¹⁵⁹ Compared with the broad disclosure goal of the Act, this increased labor cost is slight. However, the Fifth Circuit in *Turner v. Firestone Tire and Rubber Co.* recently considered whether a creditor sufficiently proved that it had maintained procedures reasonably adapted to avoid errors.¹⁶⁰ After considering defendant's so-called clerical error defense, the court held the defendant did not meet 1640(c)'s maintenance requirement and disallowed the defense.¹⁶¹ In reaching its holding, the court suggested that the error in question could have been detected by the implementation of an inexpensive screening device.¹⁶² Since *Turner* spoke in terms of the cost of a rechecking system, it can be inferred that the court considered cost as a component of "reasonable."¹⁶³ *Turner*, then, not only reinforced *Mirabal's* suggestion that rechecking satisfies 1640(c), but it also acknowledged that the cost factor was an appropriate component of 1640(c)'s maintenance calculus.

Therefore, in determining the feasibility of instituting any of the rechecking mechanisms suggested above, a cost-benefit analysis is appropriate. A creditor must weigh the overall cost of the system, including the initial outlay of capital, against the benefits derived from the fact that maintaining such a system would bring a creditor within the parameters of 1640(c). It must further be noted that in any one credit transaction, the maximum civil penalty for which a creditor could be liable is \$1,000.¹⁶⁴ Thus, the likelihood that a creditor could be found liable must be balanced against the cost of establishing and maintaining a rechecking system. However, given the remedial nature of the Act and its proconsumer posture, a creditor may not excuse his noncompliance with the maintenance requirement by claiming that the cost of a rechecking system was prohibitive. In other words, in order for a creditor to properly raise a 1640(c) defense, it must expend whatever resources are necessary to create and maintain a rechecking system reasonably adapted to avoid clerical errors.

CONCLUSION

The Truth in Lending Act has been called a disclosure act.¹⁶⁵ It

¹⁵⁸ 537 F.2d at 879 n.14.

¹⁵⁹ *Id.*

¹⁶⁰ 537 F.2d at 1298.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 15 U.S.C. § 1640(a) (1970).

¹⁶⁵ See *Ratner*, 329 F. Supp. at 276.

requires creditors to convey credit information to the consumer in a standardized format to facilitate the informed use of credit. Since the Act created a civil enforcement mechanism and since civil enforcement has been repeatedly encouraged, it is apparent that the defense contained in 1640(c) was to assume a relatively minor role in the Act's overall scheme.

The broadly remedial nature of the Act coupled with the Act's legislative history have caused courts continually to diminish the radius of 1640(c). This diminution has been accomplished by decisions such as *Ratner* which have decided that the section 1640(c) defense will apply only to clerical errors. Section 1640(c)'s circumference was drawn even tighter in *Mirabal*, where the court construed 1640(c)'s maintenance provision as requiring the institution of and adherence to a rechecking system which is reasonably adapted to avoid clerical error. This comment has also suggested that 1640(c)'s applicability be further restricted: Since the phrase "clerical error" exclusively refers to an error committed in disclosing the annual percentage rate, disclosure errors not associated with the annual rate should be excluded from sanctuary of 1640(c).

Whether these narrow constructions of 1640(c) are warranted is best judged in light of the Act's comprehensive objectives. Since 1640(c) emerged from the hearings on the Act as a narrow concession to those creditors who complained about the difficulties associated with disclosing the annual percentage rate, a narrow reading of 1640(c) is warranted. Such a reading is further supported by the Act's consumer orientation as reflected in its remedial spirit. Thus, the pervasive philosophy of the Act supports any narrowing of 1640(c) and justifies placing an extremely high burden upon those creditors who seek to defend their disclosure violations by reference to the section.

HARRY L. MANION, 3rd